FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 187.

REALTY OPERATORS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

HENRY J. RICHARDSON,
Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 187.

REALTY OPERATORS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

This brief, with the consent of counsel for both parties, is filed by the undersigned as *amicus curiae* because the decision below, if allowed to stand unreviewed, will influence the decisions of many other cases which may turn on the same general question, in one of which the undersigned is interested as counsel.

QUESTION INVOLVED.

The question in this case which the petitioner therein seeks to present for review is whether the single fact of a price increase by sugar processors generally at the time of the initiation of the processing tax on the processing of sugar shall be taken as conclusive evidence that the processor did not bear the burden of any part of such tax.

It was thought that this question was decided by this Court in its decision in *Webre-Steib Co., Ltd.* v. *Commissioner,* 324 U. S. 164. But the Tax Court decided the case at bar on May 31, 1944 (R. 43) which was before this Court decided the *Webre-Steib* case on February 12, 1945. And the Circuit Court of Appeals below has refused on appeal to correct the decision of the Tax Court to conform with the decision of this Court in *Webre-Steib,* either under some mistaken conception of the rule announced in *Dobson* v. *Commissioner,* 320 U. S. 489, or simply has declined to do so in spite of this Court's decision of the *Webre-Steib* case. Thus an anomalous situation is presented calling for the exercise of the jurisdiction of this Court in order to prevent an injustice in the instant case and to avoid the confusion in the further administration of Title VII of the Revenue Act of 1936 (49 Stat. 1648) which would undoubtedly follow in the wake of a denial of review of the instant case.

STATEMENT OF FACTS.

The record facts have been stated in the briefs of the parties in the instant case and will not be restated except in some instances in the argument hereafter.

STATUTES INVOLVED.

The applicable statutes have been set forth in appendices to the briefs of the parties to the instant case. A brief summary thereof follows:

This is a processing tax refund case under Title VII of the Revenue Act of 1936, Sec. 901-917, 49 Stat. 1747. Un-

der Sec. 902 thereof a claimant is required to prove that he bore the burden of the tax as a condition to obtaining the refund thereof. Under Sec. 907 average margins are to be computed and compared for the tax period and a base period and the results of such comparison are made "prima facie evidence" that the tax was borne or not borne by the claimant as the case might be. Under subparagraph (e) of said section it is provided that either the claimant or the Commissioner may rebut the "presumption" so established by proof of the "actual extent" to which the claimant shifted to others the burden of the processing tax. Then certain non-exclusive types of proof that may be used to rebut the presumption by showing the "actual extent" are set forth. Among these is one type, namely, proof that claimant changed the sales price of the article by substantially the amount of the tax to reflect the initiation or termination of the processing tax, "but [quoted from the statute] the claimant may establish that such acts [change in price on initiation of the tax] were caused by factors other than the processing tax, or that they do not represent his practice at other times."

REASONS FOR GRANTING THE WRIT.

1. The decisions of the courts below are in direct conflict with the decision of this Court in *Webre-Steib Co., Ltd.* v. *Commissioner*, 324 U. S. 164. In the latter case this Court, considering the same type of evidence of price increase at the time of initiation of the tax said:

> "In the absence of any clearer statement in the statute, therefore, we think the presumption is given adequate effect if the burden is placed on the Commissioner of going forward with evidence sufficient to support a finding that the claimant did not absorb the tax. Once such evidence is presented, the presumption becomes inoperative and the issue is to be determined as if there had never been a presumption. The statute declares, however, that the presumption may be rebutted by proof of 'the actual extent' to which the

> burden of the tax was shifted. This language appears to mean that the presumption may be rebutted *pro tanto,* and not necessarily all at once or not at all. Thus it does not cease to operate on introduction of evidence merely sufficient to support a finding that some of the tax was shifted. It must be evidence sufficient to support a finding that the entire tax was shifted. Short of that, the presumption is not eliminated but only diminished to the extent that the rebuttal evidence will support a contradictory finding."

and again:

> "Nor is the Commissioner's evidence so conclusive as to deprive the margin evidence of all significance. It permits but does not require a finding that petitioner had a uniform practice of billing the tax as a separate item. Even though such a practice be inferred, there is no evidence to show how far petitioner succeeded in its effort to pass the tax on, except for the evidence that there was a general rise in the market on a date some months before petitioner's processing began. The margins are some evidence that the price may not have responded continuously to the effort to shift the tax."

2. The decision of the Tax Court below was made before, and therefore without benefit of, the direction of this Court's decision in the *Webre-Steib* case. It was also made at a time when, although it does not cite, the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Webre-Steib* v. *Commissioner,* 140 F. (2d) 768, and *Commissioner* v. *Bain Peanut Co.,* 134 F. (2d) 853, had not been reversed. In both these cases Writs of Certiorari were granted by this Court, the *Webre-Steib* case being modified and remanded on the above reasoning, and the *Bain Peanut* case being dismissed by the petitioner therein, which means that it was settled out of court by the administrative payment of a refund.

3. To allow the decisions of the instant case below to stand unreviewed would be untenable because it would give

rise to confusion in the lower courts, and in the further administration of Title VII of the Revenue Act of 1936 as to the effect of a price increase made at the time the tax was imposed notwithstanding any and all other evidence. The reason the undersigned is filing this brief as *amicus curiae* is because he represents as counsel another member of the "sugar industry". When that case comes on for decision by the Tax Court, what will the Tax Court consider to be the law on this point, its decision in the instant case or this Court's decision in the *Webre-Steib* case? There would of certainty be grave doubt if this Court denies the Writ. If the decision of this Court in the *Webre-Steib* case is controlling, the undersigned can have a fair trial based on all the evidence of price and price factors which he is able to produce. But if the "generalizing principle" of an industry-wide price increase is to be taken as conclusive evidence, as in the instant case, rather than the particular circumstances of the individual case, then any trial by another member of the industry would be useless.

In *Commissioner* v. *Est. of Edward T. Bedford*, (65 Sup. Ct. 1157), this Court said:

> "And if the case can be reduced to its own particular circumstances rather than turn on a generalizing principle, we should feel bound to apply *Dobson* v. *Commr.*, 320 U. S. 489, and sustain the Tax Court."

ARGUMENT.

It is obvious from a reading of the Tax Court's short opinion below (R. 40) that regardless of the showing of the margin evidence, and of all the other evidence which if considered might have shown the "actual extent" the tax was shifted, the Tax Court accepted as controlling the one fact of a price increase equivalent to the tax at the time the tax was initiated. This is exactly what this Court would not permit in the *Webre-Steib* case, otherwise the decision of the Circuit Court of Appeals therein would have been affirmed rather than modified and remanded as was done.

This case appears to furnish a convenient vehicle for this Court to appropriately instruct the courts below that they should cite the decisions which have controlled their judgment instead of leaving to guess work the ascertainment of the grounds therefor.

Although the Tax Court below does not cite in its opinion in the instant case either *Commissioner* v. *Bain Peanut Co.* (134 F. (2d) 753), or the *Webre-Steib Co., Ltd.* v. *Commissioner* (140 F. (2d) 768), decided by the Circuit Court of Appeals for the Fifth Circuit, obviously it was greatly influenced by the decisions of these cases by the same Circuit Court of Appeals to which the instant case would be appealable.

In both the *Bain Peanut* case and the *Webre-Steib* case the Circuit Court of Appeals for the Fifth Circuit had held that the introduction by the Commissioner of evidence of a price increase at the time the tax was initiated completely rebutted the presumption based on the margin evidence and in fact eliminated such margin evidence from further consideration in the case. In both cases this Court granted certiorari and upon review modified and remanded the *Webre-Steib* case, the *Bain Peanut* case being dismissed by the petitioner therein. And, although the Circuit Court of Appeals below does not in its opinion in the instant case cite the *Dobson* case, the Government there urged and again urges in this Court in its brief in opposition to the petition (page 17) the application of the rule of that case. Furthermore, the tenor of the opinion of the Circuit Court of Appeals below indicates its reliance upon the *Dobson* case in blindly approving the decision of the Tax Court without so much as discussing the obvious applicability of this Court's opinion in the *Webre-Steib* case.

In what connection the Circuit Court of Appeals below cited the *Webre-Steib* case (R. 129) in its opinion is most difficult to imagine. The context in which such citation appears contains a misstatement of what the Tax Court said of the evidence of price increase which misstatement is di-

rectly contrary to what the Tax Court found as a fact. Reference is made to the following statement in the Circuit Court's opinion:

> "Evidence that petitioner increased its selling price of sugar in the amount of the tax on the very day that the tax went into effect, and never reduced it during the tax period, was exactly (fol. 131) the kind of evidence mentioned in the statute and sufficient to rebut the presumption in favor of the taxpayer."

Thus on this misstatement the decision of the Tax Court is affirmed, citing the *Webre-Steib* case.

Now what the Tax Court actually said was the basis of its decision was (R. 41):

> " . . . the one inescapable fact which stands out in the complicated record before us is that petitioner, along with the entire sugar industry, increased the price of sugar in the amount of the tax on the very day when the tax went into effect and the price was not reduced at any later time *by the amount of the tax or for the purpose of subtracting the tax from the sales price.*" (Emphasis supplied)

The Tax Court could not have made the statement without the qualifying clauses emphasized above, because it found as a fact (R. 37):

> "On June 8, 1934, when the provisions of the Agricultural Adjustment Act went into effect and the increase of price was made by the sugar industry, the price of refined sugar rose from $4.10 to $4.65 per hundred pounds. The price rose to $4.75 on October 1, but fell by December 21 to $4.30, the same price it had brought on that day in 1933."

It will be seen therefore that the price of sugar *was reduced during the tax period*, which is directly contrary to the statement made and relied upon by the Circuit Court of Appeals.

It will be further seen that the Tax Court labored under a misconception of the law as this Court later expounded

it in the *Webre-Steib* case, in thinking that price *reduction* had to equal the tax and be identified therewith or else the presumption of the margin evidence would be entirely rebutted and thus no longer to be considered as evidence.

The Tax Court did not even consider the other evidence in the instant case to be sufficiently important to require definite findings based on the margin evidence, *i.e.*, as to whether such margin evidence favored the taxpayer or the Commissioner, saying:

> "Therefore, any presumption which might be raised in petitioner's favor by a lower 'margin' during the tax period has been rebutted by respondent's affirmative proof."

The opinion of the Tax Court shows further a complete misconception of the matters mentioned in Sec. 907(e), the proof of which would show the "actual extent" of the shifting of the burden. The Tax Court said:

> "However, any presumption in petitioner's favor raised by such a lower 'margin' under section 907(e) is overcome, under section 907(e)(2), by 'the proof that the claimant * * * changed the sale price of the article * * * by substantially the amount of the tax * * * .' The claimant, in turn, under this same section, may establish that this change was caused by factors other than the processing tax. These factors, section 907(e)(1) are changes (A) in the type or grade of article or commodity, or (B) in costs of production."

Now it is generally considered that the pattern of Sec. 907(e), setting forth certain non-exclusive items, proof of which shall constitute rebuttal of the presumption based on the margin evidence by showing the "actual extent" of shifting the tax burden, places in subparagraph (1) the items available to the taxpayer to rebut a partly or wholly unfavorable margin presumption, and in subparagraph (2) the items available to the Commissioner to rebut a partly or wholly favorable presumption. Yet after the quotation

above from the Tax Court's opinion, the court goes on to point out the failure of the taxpayer to show that changes in type of commodity occurred at the time of the price increase or in any way caused the price increase. These are items of rebuttal set forth in Section 907(e)(1).

The items of 907(e)(1) are calculated to permit by measurable proof thereof that an unfavorable margin may be overcome to that extent.

The items of 907(e)(2) are calculated to overcome *pro tanto* a favorable margin if the taxpayer does not come forth and show that the practice was not uniform or that it was due to factors other than the tax.

Petitioner in the instant case proved and the Tax Court found that the price of raw sugar advanced from $2.80 to $3.35 per cwt. between June 8 to August 30, 1934 (R. 37). Anticipation of such an increase in the cost of commodity would certainly constitute a "factor other than the tax" to cause the increase in price. The record also shows (R. 39) that the price of refined sugar fluctuated between $4.75 and $4.30 per cwt. between June 8 and December 31, 1934, thus showing that the "sugar industry" was not able to maintain the increased price to include the tax. This would indicate that the claimant's practice at other times was not to include the tax in the price.

Finally, the Tax Court gets confused with the age-old question of which is "cause" and which is "effect", saying:

> "It may well be that the quotas placed upon the importation of sugar made it possible for the price increase to be made, but the fact that the price increase was made not only on the date when the tax went into effect, but also in the approximate amount of the tax, indicates clearly that the petitioner was shifting the burden of the tax by the increase in price. The existence of the quota system was a circumstance which made some price increase possible but it was not a 'factor' within the meaning of the statute which would make the price increase necessary, such as a change

in the type of commodity produced or a change in the cost of production."

Anyone who knows the economics of the "sugar industry" in this country knows that a condition which "permits" a price increase also "causes" such increase.

The system of quota controls had to do with the restriction of production for consumption in the United States. It became effective under the same Act and on the same date the tax was imposed. It was calculated and intended to "permit" or "cause" an increase in the price of raw sugar to the producer. Such a price increase would automatically "cause" an increase in the price of refined sugar by the processor.

Due to the system of tariffs, subsidies, quotas and other controls which have intermittently marked the policy of this Government with respect to the commodity "sugar" over the past 150 years, the statistics and price action under any given condition of supply and demand with respect to sugar are probably better known than is the case with respect to any other commodity extensively consumed in this country. Almost any sugar economist can forecast what the price of sugar will be in this country if he knows the available supply. This price will, of course, fluctuate due to seasonal conditions and market and transportation conditions in a given territory, but otherwise is relatively stable, depending on supply and tariff rates.

During the short period from 1933 to 1936 three major price factors each occurred at least twice, but on only one occasion did they each occur simultaneously, to wit, June 8, 1934. These three factors are:

1. Quota restrictions, either imposed or anticipated;
2. Change in rate of tariff; and
3. Initiation or elimination of the tax on processing.

Now let us see how these price factors each or in combination affected the price of raw and refined sugar during

this period. Observing the substantial price changes coupled with the factor or factors which "caused" or "permitted" such changes, it will be seen:

(1) That the price of raw sugar rose from a low of 2.85 cents per lb. in March to a high of 3.65 cents per lb. in July to September 1933, and that the price of refined sugar rose from a low of 3.85 cents per lb. in March to a high of 4.60 cents per lb. in July to September 1933. This was the period during which efforts were being made under Government auspices to stabilize the amount of sugar available for domestic consumption through voluntary quota restrictions, which were rejected by the Secretary of Agriculture in October 1933 (R. 34-35).

(2) That thereupon there were declines aggregating some .40 cents per lb. in the price of both raw and refined sugar which continued until February 10, 1934 when the President of the United States sent a message to Congress recommending legislation permitting the imposition of a system of quotas, etc., by the Secretary of Agriculture (R. 35).

(3) Thereupon the price of both raw and refined sugar increased some .20 cents per lb. and remained steady until April when the pattern of the recommended legislation was published (R. 35-36).

(4) That between that date and until June 8, 1934 when the tax became effective, when a .50 cent per lb. reduction in the tariff rate on Cuban raw sugar became effective, and when the system of quota controls *also* became effective, the price of refined sugar fell to $4.10 and raw sugar to $2.80 per cwt. This decline is said to have been "caused by the anxiety of the refiners to get rid of sugar on hand before the new 'floor tax' under the Agricultural Adjustment Act went into effect; retailers being allowed thereunder a 30-day stock of sugar free from tax, section 16(h)." (R. 37);

(5) That the price of refined sugar was increased from 4.10 to 4.65 cents per lb. on June 8, 1934, when the tax, lower tariff rate and quota restrictions simultaneously went into effect;

(6) That the price of raw sugar did not decline concurrent with the reduction in tariff rate of .50 cents per lb. on Cuban raw sugar as would have been expected except for the quota restrictions which were imposed at the same time, but on the contrary advanced within two months from 2.80 to 3.35 cents per lb. which absorbed all the refiners' increases in prices except .10 cents per lb. which held from July 25 to September 2, 1934;

(7) That on September 3, 1934 another reduction in the rate of tariff on Cuban raw sugar of .60 cents per lb. was made and the price of domestic raw sugar and duty paid Cuban raws fell .50 cents per lb. and the cost and freight prices of Cuban raw fell .10 cents equaling the reduction in the tariff rate. On that occasion no change in the quotas or taxes occurred.

(8) That on termination of the tax (the quota remaining in effect) by the decision of this Court in *Butler* v. *United States,* (297 U. S. 1), the price of refined sugar fell only .15 cents per lb. and the next day the price of raw sugar fell an equal amount.

In summary, these price changes and the description of the conditions under which they occurred show:

(1) That on the two occasions when quota restrictions on supply were (1) anticipated, and (2) imposed, the price of both raw and refined sugar advanced substantially, *i.e.,* acted similarly on both occasions;

(2) That on the two occasions when a reduction in the rate of tariff occurred, (1) on June 8, 1934 in combination with the imposition of quota restrictions and

the initiation of the tax on processing, the price of raw sugar did not decline but on the contrary shortly advanced, and (2) on September 2, 1934 when the second reduction in the rate of tariff occurred the price of raw sugar declined an equivalent amount, there then being no change in the quotas or in the tax, *i.e.*, acted in an opposite manner;

(3) That on the two occasions when tax changes occurred, (1) when the tax was initiated in combination with the imposition of quota restrictions on supply and the reduction in rate of tariff, the price of both raw and refined sugar advanced about .55 cents per lb., and (2) when the tax was eliminated, there being no change in quota or tariff, the price fell only slightly, .15 cents per lb.

Certainly this analysis would indicate that the dominant price factor that occurred on June 8, 1934 which "caused" the price increase on that date was the quota restriction and not the initiation of the tax.

With all these standards of behavior of the price of raw and refined sugar under varying and parallel conditions in the record before it, the Tax Court chose to base its decision on but one fact, namely, the price increase of refined sugar at the time of the initiation of the tax, considering no other factor as a "cause". Why? Simply because the Tax Court must have thought it was bound by the decisions of the Circuit Court of Appeals for the Fifth Circuit, to which the instant case would be appealable, in the *Bain Peanut* and *Webre-Steib* cases.

CONCLUSION.

In conclusion it is submitted that the Tax Court, under a misconception of the law (*Commissioner* v. *Heininger*, 320 U. S. 467, 475)[1] did not consider all the evidence of the case in the record before it, and that this Court ought to grant the writ and reverse and remand the case for such consideration.

Respectfully submitted,

HENRY J. RICHARDSON,
Amicus Curiae.

---

[1] Therein the Court said: "However, as we have pointed out above, the Board of Tax Appeals here denied the claimed deduction not by an independent exercise of judgment but upon a mistaken conviction that denial was required as a matter of law. We therefore affirm the judgment of the Circuit Court of Appeals reversing and remanding the cause to the Board of Tax Appeals."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 187.

REALTY OPERATORS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 188.

WILLIAM HENDERSON (PARTNERSHIP), *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 189.

LAURENCE M. WILLIAMS, as LIQUIDATOR OF STERLING SUGARS, INC., formerly a LOUISIANA CORPORATION, and STERLING SUGARS SALES CORP., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR RECONSIDERATION OF DENIAL OF WRITS OF CERTIORARI—OCTOBER 14, 1946.

C. J. BATTER, ESQ.,
910 17th Street, N. W.,
Washington 6, D. C.
Attorney for all Petitioners.

R. E. MILLING, JR., ESQ.,
1122 Whitney Building,
New Orleans 12, Louisiana.
Attorney for Laurence M. Williams.

JOHN L. TOLER, ESQ.,
724 Whitney Building,
New Orleans 12, Louisiana.
Attorney for William Henderson.

Of Counsel for Laurence M. Williams:
MILLING, GODCHAUX, SAAL & MILLING,
1122 Whitney Building,
New Orleans 12, Louisiana.

Of Counsel for William Henderson:
CHAFFE, MCCALL, BRUNS, TOLER & PHILLIPS,
724 Whitney Building,
New Orleans 12, Louisiana.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

LIST OF AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 187.

REALTY OPERATORS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 188.

WILLIAM HENDERSON (PARTNERSHIP), *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 189.

LAURENCE M. WILLIAMS, as LIQUIDATOR OF STERLING SUGARS, INC., formerly a LOUISIANA CORPORATION, and STERLING SUGARS SALES CORP., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR RECONSIDERATION OF DENIAL OF WRITS OF CERTIORARI—OCTOBER 14, 1946.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Court denied the petitioners' applications for writs of certiorari to the Fifth Circuit Court of Appeals on October 14th. We respectfully request the Court to reconsider its decision not to grant the writs for the reason that unless this Court does grant the writs, your petitioners will be

denied the justice obtained by numerous other sugar processors. There is

No Question of Law to be Decided.

—only an opportunity to have the Tax Court apply the law as expounded by this Court in *Webre Steib Co., Ltd.* v. *Com.* (324 U. S. 164)—because the Tax Court decided the instant cases before this Court construed the applicable law. Nor is the *Dobson* rule of law at issue because it certainly can have no application where, as here, the Tax Court acted on a theory since rejected by this Court in the *Webre Steib* (supra) case. The same exercise of discretion that prompted this Court to hear and remand to the Tax Court the *Webre Steib* (supra) case, requires that the cases at bar be remanded—because

The Basic Facts in the Instant Cases are on All-Fours with the Webre Steib Case.

in almost every particular—to the extent that even the seasonal operation exists in *Realty Operators, Inc.* (No. 187). They involve the same sugar industry, are located in the same state, serve the same market, and are governed by the same general set of facts—especially the price advance of June 8, 1934.

Since this Court construed the statute,

The Tax Court Has Followed the Webre Steib Case and as a Result Thereof a Number of Other Sugar Cases Have Been Settled.

In *South Coast Corporation,* another sugar case, (T. C. Memo Decision Docket No. 2165, decided June 11, 1945) the Tax Court followed the rule laid down by this Court and held the June 8, 1934 price rise not controlling, stating:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

Those are the words of Judge Leech after this Court spoke; whereas before this Court spoke, Judge Leech in respect to one of your petitioners said:

> "The Processing Corporation, together with other producers of sugar, increased on this date its prices to customers by the amount of 55 cents per 100 pounds *and the fluctuation of sugar prices on the market after that date was from the higher level thus set.*" (Italics supplied) (Williams No. 189, Record 87)

Counsel in the cases at bar—since the *Webre Steib* decision—has settled six sugar processing and unjust enrichment tax cases pending before the Tax Court, namely Docket Nos. 108,029; 111,018; 111,050; 109,622; 110,073 and 424 PT; and, previously the *Insular Sugar Ref. Co.* (141 Fed. 2d 713) was awarded a refund by the U. S. Court of Appeals for the District of Columbia.

Therefore your petitioners are in the unique position of being the sole sugar processors denied

Equal Justice Under Law.

unless this Court grants certiorari and remands the cases to the Tax Court. We appeal to this Court not to permit the rights of your petitioners to lapse without giving the Tax Court the opportunity to apply the law as it was later construed.

There is no law to be briefed, argued and decided—all of that has been done. All that is needed is a remand to the Tax Court so that it may apply the decided law.

Authorities.

Somewhat analogous situations have arisen before this Court in the past, and it has given relief where an intervening event has caused the judgment of the lower court to be in error. Here the decision of this Court in *Webre steib Co., Ltd.* v. *Com.* (supra) construing the processing tax refund statute is an intervening event that requires correction of the Tax Court's theory of the law of the case.

In *Watts, Watts & Co. Ltd.* v. *Unione Austriaca di Navigazione* (248 U. S. 9) in an opinion by Mr. Justice Brandeis this Court reversed a lower court because of an intervening proclamation by the President declaring a state of war, and said:

> "And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below."

In *Butler* v. *Eaton* (141 U. S. 240) this Court reversed a judgment that was correct when rendered, but became incorect by a subsequent decision of this Court in a related matter. In *William Crozier* v. *Fried. Krupp Aktiengesellschaft* (224 U. S. 290) an intervening Act of Congress caused this Court to reverse a lower court that had correctly decided an issue before the legislation was passed.

In *Gulf, Colorado & Santa Fe Railway Company* v. *W. R. Dennis* (224 U. S. 503, 32 S. Ct. 542), this Court reversed a lower court, stating: (32 S. Ct. 544)

> "The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done."

As recently as 1940, in an opinion by Chief Justice Hughes, in *Carpenter* v. *Wabash Ry. Co.* (309 U. S. 23, 27), the Court reaffirmed the rule stated by Chief Justice Marshall in *U. S.* v. *Schooner Peggy* (1 Cranch 103, 110):

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

On February 1, 1943, in an opinion by Mr. Justice Reed in *Ziffrin, Inc.* v. *U. S.* (318 U. S. 73), this Court said: (page 78)

> "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law."

The decisions of the Tax Court, in the cases at bar, were correct when rendered only in the sense that there was no higher authority existing on that date. This Court's subsequent decision in Webre-Steib (*supra*) made those decisions wrong.

THEREFORE, it is prayed that this Court will reconsider the petitions for certiorari; grant the writs and order the cases remanded to the Tax Court with instructions to weigh the evidence and arrive at conclusions of law consistent with the law expounded in *Webre Steib Co., Ltd.* v. *Com.* (supra).

Respectfully submitted,

C. J. BATTER, ESQ.,
910 17th Street, N. W.,
Washington 6, D. C.
Attorney for all Petitioners.

R. E. MILLING, JR., ESQ.,
1122 Whitney Building,
New Orleans 12, Louisiana.
Attorney for Laurence M. Williams.

JOHN L. TOLER, ESQ.,
724 Whitney Building,
New Orleans 12, Louisiana.
Attorney for William Henderson.

Of Counsel for Laurence M. Williams:

MILLING, GODCHAUX, SAAL & MILLING,
1122 Whitney Building,
New Orleans 12, Louisiana.

Of Counsel for William Henderson:

CHAFFE, MCCALL, BRUNS, TOLER & PHILLIPS,
724 Whitney Building,
New Orleans 12, Louisiana.

CARL J. BATTER, a member of the bar of this Court, certifies that the preceding petition for reconsideration is made in good faith and not for delay, and in the sincere conviction that the ends of justice will be best served if the writs are granted.

C. J. BATTER
910 17th Street, N. W.
Washington 6, D. C.